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No. 165

In the

Supreme Court of the United States

OCTOBER TERM, 1959

THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. HART WILLIS,
1408 Tower Petroleum Building,
Dallas 1, Texas,
Attorney for Petitioners.

Of Counsel:
WAYLAND K. SULLIVAN,
HAROLD C. HEISS,
CLARENCE E. WEISELL,
Cleveland, Ohio.
V. C. SHUTTLEWORTH,
Cedar Rapids, Iowa.
WILLIAM P. FONVILLE,
HART WILLIS, JR.,
Dallas, Texas.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

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Since the filing of the petition for a writ of certiorari in this proceeding and the filing of Respondents' Brief in Oppostion to the Petition for Writ of Certiorari, the opinion of the United States District Court for the Southern District of New York, Bryan, District Judge, dated June 19, 1959 in the case of *Baltimore & Ohio Railroad Company, et al., Plaintiffs, v. United Railroad Workers Divi-*

sion of the Transport Workers Union of America, CIO, in Its Own Right and as Representative of United Railroad Workers of America, CIO, Local 1463 Thereof and Their Members, et al., Defendants, has come to the attention of petitioners. The opinion is to be found reported at 38 *Labor Cases* Par. 65,751 but it does not appear to have been published as yet in the *Federal Supplement.* Accordingly the entire opinion is printed as an appendix to this brief.

The circumstances in that case are strikingly similar to the circumstances here. The order of the District Court in that case, as did the order of the District Court here below, enjoined the employees from striking pending the disposition of the dispute by the Railroad Adjustment Board and required the carriers to restore and maintain the status quo ante by rehiring the fired employees pending the disposition of the dispute by that Board. The case is demonstrative of the fact that the situation involved in this proceeding in which review by certiorari is sought on the basis that it presents important federal questions which have not been but should be settled by this Court is not an isolated condition but one which has recently occurred in at least two circuits. The opinion also persuasively and impressively presents the case for the right, in fact the duty, of a court of equity from which an injunction is sought against a strike provoked by the unilateral action of a carrier resulting in the lay-off of employees or the abolition of jobs, claimed by the employees to be protected by collective bargaining agreements, to require restoration and maintenance of the status quo ante.

In that case the labor dispute stemmed from action taken by the railroads on June 10, 1959 when they posted notices advising that all positions as fireman or oiler fireman on the tugs using diesel power would be abolished as of five days later, 12:01 A.M. on June 15, 1959. Defendant Local 1463 of the Transport Workers Union thereupon advised the railroads that it had authorized a strike of tugboat and bridge forces to be called June 15, 1959 at 12:01. Plaintiff railroads secured from the court an order to show cause why a temporary injunction against the strike should not be granted. That order contained a provision restraining the strike. On the return day of the railroads' motion for preliminary injunction the defendant unions by cross-motion sought an order directing the railroads to restore the firemen oilers who had been fired to their positions pending determination under the procedures authorized by the Railway Labor Act of the labor dispute which existed by reason of this controversy. Prior to the hearing of the motion the railroads on June 15, 1959 pursuant to their notices had fired at least 125 men.

Prior to the argument of the motions the railroads made an ex parte submission to the Railroad Adjustment Board of their claim that there were no restrictions under existing agreements which prevented the carriers from abolishing the position of oiler on their diesel tugs. The submission proceeds upon the theory that since the collective bargaining agreements do not on their face prohibit or restrict the abolition of these jobs the carriers have the common law right to abolish these jobs in the exercise of their manage-

ment prerogatives. On June 15 the day before the motions were returnable the National Mediation Board requested representatives of the parties to meet with it for discussion and investigation of the issues involved in the dispute. The discussions were suspended pending the determination of the motion by the court.

The railroads had made a transition from steam to diesel tugs over a number of years. On steam tugs there had been at least two men in the engineroom, the engineer and a fireman. The practice of having two men in the engineroom continued after diesel tugs were substituted for steam tugs and the second man was denominated oiler or oiler-fireman. Plaintiff railroads contended that the change from steam to diesel made the oiler unnecessary. Collective bargaining agreements negotiated when diesels were in operation and oilers were specifically listed among workers covered were in force. The railroads claimed that as management prerogative they had an uncontrolled discretion to abolish unnecessary jobs in the absence of express contractual provision to the contrary and that this was no concern of the union and did not give rise to a labor dispute. The unions contended that the oilers' jobs were protected by the collective bargaining agreements and that the abolition of the positions constituted a unilateral modification of the outstanding collective bargaining agreements by the railroads and that the railroads had not followed the mandatory processes provided by the Railway Labor Act for modifying contractual agreements.

The Court said:

"[*Issues*]

"The questions presented for decision here are whether, pending the completion of the procedures prescribed by the Railway Labor Act, (1) the railroads are entitled to a preliminary injunction restraining the strike or work stoppage by the unions and (2) the unions are entitled to a decree directing the plaintiffs to restore the status quo by returning the oilers who have been laid off to their positions. The determination of these questions depends on the interpretation and application of the Railway Labor Act which I have recently had occasion to consider extensively in *American Airlines v. Air Line Pilots Association*, 169 Fed. Supp. 777 [36 Labor Cases ¶65,151]. It is unnecessary to repeat the analysis of the various provisions of the Act which I made there.

However, a brief discussion of the mechanics of the Act as it is applied in the settlement of labor disputes will be helpful.

"[*Minor or Major Dispute*]

"Such disputes are either minor or major. This terminology is not used in the Act but arises from the definitions contained in Section 3, First, (i), Section 2, Sixth and Seventh, and Section 6. Thus, what are termed 'minor' disputes arise out of the interpretation or application of existing collective bargaining agreements and grievances arising therefrom. A major dispute, on the other hand, is one that arises from an intended 'change in agreements affecting rates of pay, rules or working conditions.' See *Elgin J. & E. R. R. Co. v. Burley*, 325 U. S. 711 [9 Labor Cases ¶51,212].

"This distinction is of major importance here where the railroads assert that whatever dispute presently exists is minor and the unions insist that it is major. Its importance lies in the different legal consequences which flow from the two different kinds of disputes.

"Both must be first negotiated between the parties. If such negotiations are unsuccessful the process for the settlement of major and minor disputes diverges widely. A minor dispute may be referred by either or both parties to the Railway Adjustment Board or to the appropriate system Adjustment Board designated by the collective bargaining agreement. The Adjustment Board determines the dispute and its decision is final. In the case of a minor dispute a strike during the pendency of the matter before the Adjustment Board is illegal and may be enjoined. There is no right to strike or to use any economic self-help or pressure even after the award has been made and the parties are bound to comply with it. *Brotherhood of Trainmen v. Chicago River & Indiana R. R. Co.*, 353 U. S. 30 [32 Labor Cases ¶70,566].

"If, on the other hand, the dispute is major a different procedure is followed after the preliminary negotiations have failed. There is no compulsion on the parties to agree at any stage of the procedure. However, duties are specifically imposed on both carrier and union to attempt the settlement of major disputes by mediation under the aegis of the National Mediation Board. Mediation failing, the Board may recommend arbitration. If the parties accept arbitration they are bound by the award of the arbitrators. If they refuse to accept arbitration a Presidential Emergency Board may be convoked under appropriate circumstances which makes a report and recommendations on the dispute.

"There are three 'freeze' or 'cooling-off' periods covering the entire course of the proceedings required to be followed under the Act, and the parties are required to maintain the status quo with respect to the matters in controversy until thirty days after the processes of the Act have been exhausted.

"While the parties are free to resort to the recognized types of economic coercion or pressure after

the exhaustion of the processes of the Act, neither strike nor lockout nor any other change in the status quo may be resorted to until such exhaustion has taken place, and any such action may be restrained by injunction. *American Airlines v. Air Line Pilots Association, supra*, and cases there cited.

"[*Labor Emergency Provision*]

"Moreover, a further mechanism is provided by the Act to aid in the settlement of any dispute whether it be major or minor. If a dispute reaches such proportions that in the view of the National Mediation Board a 'labor emergency' exists, the Board may proffer its services under Section 5, First, (b) of the Act. In this situation the Board in its discretion may treat the controversy as a major dispute and mediate on that basis. If this occurs the various 'freeze' provisions of the Act applicable in the case of major disputes come into play and neither of the parties may change the status quo 'in effect prior to the time when the dispute arose.'

"It also seems plain that the Mediation Board may attempt to resolve the dispute even if in its view it is minor. If such efforts to resolve a minor dispute fail the Mediation Board may remit the parties to the appropriate Adjustment Board for determination. See *Brotherhood of Trainmen v. Chicago River & Indiana R. R. Co.*, 353 U. S. 30 [32 Labor Cases ¶70,566].

"The policy of the Act is to avoid economic strife and disruption in the vital transportation industry. In some areas of strife (where the disputes are minor) the parties are precluded from waging private economic warfare to the detriment of the public. These disputes are referred to final and binding compulsory arbitration. The freedom of either party to resort to economic self-help is subordinated to the public interest in maintaining a functioning and uninterrupted transportation system. *Elgin J. & E. R. R. Co. v. Burley, supra*, pages 725-728.

"In major disputes involving issues which are of vital importance to the parties, while the Act does not proscribe the use of ultimate economic coercion, the public interest is protected until the procedures of the Railway Labor Act have been fully exhausted. The 'freeze' provisions which the Act contains serve both as a 'cooling-off' period and as a period in which public opinion can be crystallized as a means of pressure upon the parties to reach agreement without strike or lockout and the consequent disruption of commerce.

"At least in the case of major disputes it is plain that it is the purpose of the Act to maintain the status quo ante throughout.

"The present controversy is plainly one which falls within the statutory scheme of the Railway Labor Act and is to be determined pursuant to its provisions. What is the posture of this controversy in terms of the Railway Labor Act procedures?

"[*Railroad's Treatment of Controversy as Major Dispute*]

"The railroads, proceeding on the premises that this is a minor dispute, have made their ex parte submission to the Railway Adjustment Board. Implicit in this submission is the concession that even the question of whether they have the right to abolish these positions in the exercise of uncontrolled managerial prerogative is a matter for determination by that Board.

"The basis of the railroads' contention that this is a minor dispute is not entirely clear. As far as I am able to ascertain, their position may be summarized as follows:

"There is no express prohibition in the collective bargaining agreements against abolition of the oilers' positions or, indeed, against abolition of the oilers' positions, or indeed, against the abolition of any posi-

tions deemed by the management to be unnecessary. Such abolition is matter of management prerogative which lies in the uncontrolled discretion of the railroads. Therefore, the matter is one in which the unions have no voice and does not constitute a labor dispute at all. Since the unions maintain that the oiler positions are protected by the collective bargaining agreement, the only dispute there can be concerns the interpretation and application of these existing contracts and is therefore a minor dispute only.

"[*Unions' Treatment of Controversy as Minor Dispute*]

"The unions, on the other hand, maintain that the abolition of these positions which are expressly covered as to wages, hours and working conditions by the collective bargaining agreements, constitutes an attempted unilateral change or modification of the agreements which cannot be accomplished without following the procedures, including notice of intended change provided by Section 6 of the Act. The dispute is therefore necessarily a major one. Moreover, the unions contend that if the oilers do any work at all (and it is claimed that they do considerable) the abolition of their positions will necessarily mean the reassignment of such work to other crafts or classes of employees, which is forbidden by the collective bargaining agreement and necessarily involves a change in the terms of such agreements within the meaning of Section 6. See *O'Donnel, et al. v. Pan American World Airways, Inc.*, Second Circuit, 200 Fed. 2d 929 [22 Labor Cases ¶67,-327]; *Butte, A. & P. R. R. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, D. C. D. Montana, 168 Fed. Supp. 911 [37 Labor Cases ¶65,284], affirmed Ninth Circuit, No. 16,372, May 18, 1959 [37 Labor Cases ¶65,485]. (It may be noted that one of the unions asserts that it represents oilers only and that the action of the railroads totally abolishes the class of employees which it represents.)

"It may be noted, however, that at this point the National Mediation Board is making its own investigation. No doubt, in the course of that investigation and discussions had with the parties, attempts will be made to adjust the controversy.

"If those attempts fail the Mediation Board may either withdraw from the matter or determine that a labor emergency exists and thus invoke the processes of the Act applicable to major disputes. If the Board withdraws then the Adjustment Board must act on the submission of the railroads and any counter-submissions made by the unions.

"[*Jurisdiction*]

"Of course, the unions may question the jurisdiction of the Adjustment Board over the disputes submitted by the railroads upon the ground that it is a major rather than a minor dispute, as the Board may also do on its own motion. The Boards will have to determine their own jurisdiction, and in making that determination decide whether the dispute is major, as the unions claim, or minor as the railroads claim. The Boards clearly have the power to make such a determination. See Garrison, *The National Railroad Adjustment Board*, 46 Yale Law Journal 568.

"If the Adjustment Board should take jurisdiction then either (a) it may find in favor of the railroads on the merits and the railroads would be free to abolish the positions, or (b) it may determine the questions submitted against the railroads on the merits, in which event the railroads would, of course, be obligated to retain these persons in their positions, or (c) it may direct the parties to take such other action or impose such conditions as it deems appropriate under the circumstances.

"If the Adjustment Board declines jruisdiction on the ground that the dispute is major, then the parties are relegated to their remedies under Section 6 for the

settlement of major disputes and are bound to maintain the status quo ante pending the exhaustion of such procedures.

"There is no question that the appropriate agencies under the Railway Labor Act have the power to decide which of these contentions, and any related contentions of the parties, are correct. This is true even as to the railroads' claim that there is no labor dispute at all on the theory that abolition may be made as a matter of managerial prerogative. *Norfolk & P. B. L. R. Co. v. Brotherhood of Railroad Trainmen*, Fourth Circuit, 248 Fed. 2d 34 [33 Labor Cases ¶70,944], certiorari denied 355 U. S. 914. Cf. *Brotherhood of Railway & Steamship Clerks v. Railroad Retirement Board*, Eighth Circuit, 239 Fed. 2d 37.

"Not only have the Railway Labor Act agencies the power to decide such questions but they are the appropriate agencies to decide them. The Railway Labor Act contemplates that such questions shall in the first instance be decided within its framework rather than by the courts. These agencies have the competence and expertise in this field which qualify them to make such determinations and make it particularly fitting that they should make them.

"I do not propose to usurp their functions here and to substitute the courts for the processes of the Railway Labor Act provided for this purpose by the Congress.

"Therefore, I will not undertake to decide these questions here but will remit the parties to the processes of the Railway Labor Act for their determination. My only concern at this stage is to vindicate the policies and procedures of the Railway Labor Act and to permit them to be carried out effectively.

"[*Preservation of Status Quo*]

"One thing is plain, however, at least until it is determined whether this is a major or minor dispute,

it is essential as a practical matter that the status quo ante be maintained. Moreover, the maintenance of this status quo ante here is of paramount importance because the disturbance of the status quo by the firing of the oilers is plainly the cause of whatever work stoppage presently exists.

"[*Inability to Strike During Act's Application*]

"Ordinarily, whether the dispute be major or minor, the unions are precluded from striking while the procedures of the Railway Labor Act are being followed. Here, the unions assert that the railroads are precluded from enjoining the strike by the Norris-LaGuardia Act because they failed to engage in preliminary negotiations with the unions as they were required to do before formal submission to the agencies which the Act provides. It is unnecessary here to determine whether this contention of the unions is correct, or whether, as the railroads claim, the precipitated action of the unions in calling a strike relieved them from the necessity of entering into the negotiations with the unions which they claim they were willing to undertake had a strike call not been issued.

"For the basic practical question here is whether, as the unions claim, the railroads should be required to restore these oilers to the positions which have been abolished during the pendency of the Railway Labor Act proceedings. This is the key to the whole question of work stoppage, whether by way of strike, as the railroads claim, or by way of refusal of employees to cross picket lines, as the unions maintain.

"[*No Injunction Until Oilers Restored*]

"It seems clear to me that the railroads are not entitled to the injunctive relief which they seek unless and until they restore the oilers to these positions. The firing of these oilers, whose positions are covered by the collective bargaining agreement, and many of

whom have held these positions without protest by the railroads for many years, in the absence of any precipitating technological change or circumstance, does not seem to me to be in accordance with the theory or spirit of the Railway Labor Act.

"This is emphasized by the controversy as to whether this is a major or minor dispute, a question which remains to be determined during the course of the procedures under the Railway Labor Act, which I have outlined above.

"Moreover, the claim of the railroads that the exercise of managerial prerogative does not involve a labor dispute, which comes under the Railway Labor Act at all, is belied by its own *ex parte* submission of that very question to the Adjustment Board under the Railway Labor Act.

"The policy of the Railway Labor Act for the avoidance of economic warfare in the transportation industry in the public interest, the equities of the present situation, and the necessity of maintaining the status quo ante at least until the question of whether this is a major or minor dispute is administratively determined all impel the conclusion that the railroads should be directed to restore these oilers to their positions at this time. Indeed, until the processes compelled by the Act are followed, any change in the status quo ante violates the express purpose of the Act to 'avoid any interruption of commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.' (Section 2, First.) See *Howard v. Thompson*, D. C. E. D. Mo., 72 F. Supp. 695, 703 [13 Labor Cases ¶64,081], affirmed in part, reversed on other grounds, sub nom. *Howard v. St. Louis-San Francisco Railway Co.*, Eighth Circuit, 191 Fed. 2d 442 [20 Labor Cases ¶66,523], affirmed sub nom. *Brotherhood of Railway Trainmen v. Howard*, 343 U. S. 768 [21 Labor Cases ¶67,004]."

The court ordered the restoration of the status quo ante by directing the railroads to restore the oilers to the positions on the diesel tugs which had been abolished, pending the completion of the appropriate processes under the Railway Labor Act and enjoined the strike.

Respectfully submitted,

J. HART WILLIS,
1408 Tower Petroleum
Building,
Dallas 1, Texas,
Attorney for Petitioners.

Of Counsel:

WAYLAND K. SULLIVAN,
1370 Ontario Street,
Cleveland 13, Ohio.

HAROLD C. HEISS,
Keith Building,
Cleveland 15, Ohio.

CLARENCE E. WEISELL,
1706 Union Commerce Building,
Cleveland 14, Ohio.

V. C. SHUTTLEWORTH,
1120 Merchants National Bank Building,
Cedar Rapids, Iowa.

WILLIAM P. FONVILLE,
2232 Republic National Bank Building,
Dallas 1, Texas.

HART WILLIS, JR.,
1408 Tower Petroleum Building,
Dallas 1, Texas.

PROOF OF SERVICE

I, J. Hart Willis, one of the attorneys for the Brotherhood of Locomotive Engineers, et al., Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of ....., 1959, I served copies of the foregoing petitioners' reply to respondents' brief in opposition to petition for writ of certiorari on the Respondents, Missouri-Kansas-Texas Railroad Company of Texas, by mailing copy in duly addressed envelopes, with first-class postage prepaid, to Respondents' attorneys of record, as follows: to W. A. Thie, M. E. Clinton, and M. W. Reeves, Esquires, Barrett Building, Denison, Texas; and to O. O. Touchstone, Esquire, 405 Southland Life Building, Dallas 1, Texas.

J. Hart Willis

J. HART WILLIS,
Attorney for Brotherhood of Locomotive Engineers, et al., Petitioners,
1408 Tower Petroleum Building,
Dallas 1, Texas.

of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Sec. 153 (*National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards*):

First. There is established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Sec. 156 (*Procedure in changing rates of pay, rules and working conditions*):

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given,

or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.